UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CP ANCHORAGE HOTEL 2, LLC, d/b/a HILTON ANCHORAGE And UNITE HERE! LOCAL 878, AFL-CIO	Case Nos. 19-CA-193656, et al.

CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Dmitri Iglitzin
Kelly Ann Skahan
BARNARD IGLITZIN & LAVITT, LLP
18 W Mercer St., Suite 400
Seattle, WA 98119
Phone: (206) 257-6003
Fax: (206) 257-6048
iglitzin@workerlaw.com

Attorneys for UNITE HERE! Local 878

TABLE OF CONTENTS

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

TABLE OF AUTHORITIES

Page(s)

Cases

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

I. Introduction

Pursuant to § 102.46(b) of the Rules and Regulations of the National Labor Relations Board (the Board), UNITE HERE! Local 878 (Local 878, Union) hereby submits this Answering Brief to the Exceptions filed by Respondent CP Anchorage Hotel 2, LLC d/b/a Anchorage Hilton (Hotel, the Hilton) in response to the Honorable Andrew S. Gollin's (ALJ) decision in Case Nos. 19-CA-193656, et al.

As noted in previous briefing, this case involves consolidated unfair labor practice charges filed against the Hotel in response to its years-long campaign against the Union. After an October and November 2019 hearing in both Anchorage and Seattle, the ALJ issued a decision on March 4, 2020, correctly finding that the Hotel had unlawfully restricted Union access to the hotel; failed to bargain in good faith by prematurely declaring impasse over revisions to its Union access policy and unilaterally implementing that policy; unilaterally restricted Union access by calling the Anchorage Police Department to report Union officials when they did not comply with that policy; failed to timely provide the Union with responses to information requests; and dealt directly with employees. ALJ Decision, 37-38.

On April 1, the Hotel filed exceptions and a supporting brief with the Board seeking reversal of those findings. However, those exceptions lack merit. Specifically, the Hotel's exceptions to the ALJ's ruling regarding whether the parties were indeed at impasse and whether the Hotel unlawfully contacted the Anchorage Police Department to report trespassing by Union representatives rely on mistaken interpretations of Board law, record evidence, and the ALJ's application of one to the other. Accordingly, the Board should sustain the ALJ's decision regarding the Hotel's exceptions.

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

This answer incorporates by reference the General Counsel's briefing regarding Case Nos. 19-CA-193656, et al., including its Answering Brief filed April 14, 2020. *See* Charging Party's Post-Hearing Brief, Case Nos. 19-CA- 193656 et al.; Counsel for the General Counsel's Brief to the Administrative Law Judge, Case Nos. 19-CA 193656, 19-CA-193659, 19-CA-2063675, 19-CA-212923, 19-CA-212950, 19-CA-218647, 19-CA-228578; General Counsel's Answering Brief to Respondent's Exceptions to Administrative Law Judge's Decision Case Nos. 19-CA 193656, 19-CA-193659, 19-CA-2063675, 19-CA-212923, 19-CA-212950, 19-CA-218647, 19-CA-228578. It supplements the General Counsel's own Answering Brief.

II. The Board should sustain the ALJ's decisions regarding Respondent's filed exceptions because those exceptions are without merit.

A. The ALJ correctly found that no impasse permitted the Hotel to unilaterally implement its access proposal.

1. No single-issue impasse when the Hotel implemented its access proposal.

The Hotel's contention that single issue impasse permitted it to unilaterally implement its access proposal is based on neither record evidence nor Board precedent. In contrast, the ALJ correctly applied Board precedent to record evidence to find that the Hotel had not met its burden to prove single-issue impasse, and thus its declaration of impasse over its access proposal was invalid and unlawful. Accordingly, the Board should sustain the ALJ's finding that no impasse existed at the time the Hotel implemented its access proposal. ALJ Decision at 31-35.

Impasse exists only in limited circumstances when parties are truly deadlocked. An employer's duty to bargain does not require that they "engage in fruitless marathon discussions at the expense of frank statement and support" of one's position, *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952), but impasse only exists where irreconcilable differences in the parties' positions remain after full good faith negotiations. *See Fetzer Television v. NLRB*, 317

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

F.2d 420 (6th Cir. 1963) (in which eight good faith bargaining sessions was sufficient to declare impasse). In *A.M.F. Bowling Co*., the Board defined impasse as "the point in time when the parties are warranted in assuming that further bargaining would be futile." 314 NLRB 969, 978 (1994) (citing *Pillowtex Corp.*, 241 NLRB 40 (1979)).

However, "it is not sufficient for a finding of impasse to simply show that the employer had lost patience with the Union. Impasse requires a deadlock." *Barstow Community Hospital*, 361 NLRB No. 34, slip op. at 9 (2014). For example, impasse does not exist when, notwithstanding an employer having asserted that it had reached its final position, the Union declares its intention to be flexible and makes concessions, including seeking another bargaining session. *Grinnell Fire Protection Systems Co.*, 328 NLRB 585 (1999), *enf'd* 236 F.3d 187 (4th Cir. 2000). Nor does it exist when changed conditions or circumstances – like a party's willingness to change its previous position – renew the possibility of fruitful discussion. *See Airflow Research 7 Manufacturing Corp.*, 320 NLRB 861 (1996). When a party makes a new proposal after declaring impasse and the opposing party offers further concessions, it serves as evidence that the parties have not actually exhausted the possibility of agreement; accordingly, no impasse exists. *See Ingredion, Inc. d/b/a Penford Products Co.,* 366 NLRB No. 74 (2018).

The requirements for single-issue impasse are even more specific. The Board permits a finding of single-issue impasse only where the issue is of such "overriding importance that it justifies an overall finding of impasse on *all* of the bargaining issues." *CalMat Co.*, 331 NLRB 1084, 1098 (2000) (italics in original, citing *Sacramento Union*, 291 NRLB 55, 554 (1988), *enfd. mem sub nom. Sierra Publishing Co. v. NLRB*, 888 F.2d 1394 (9th Cir. 1989) and *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871, 881 (9th Cir. 1978)). The party declaring impasse must show three things: (1) that a good-faith bargaining impasse exists, (2) that the single issue

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

over which the parties are at impasse is a critical issue, and (3) that the impasse led to a breakdown in overall negotiations. Put another way, they must show "that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved." *CalMat*, 331 NLRB at 1098. *Accord: Bottom Line*, 302 NLRB at 379 ("Even if a party remains resolutely opposed to a particular proposal throughout negotiations, an employer does not reach impasse and cannot unilaterally implement its proposal unless 'impasse on a single or critical issue creates a complete breakdown in the entire negotiations'").

The Union's demonstrated willingness to make concessions and compromises in its 2017 proposals indicates no impasse existed, single-issue or otherwise. Accordingly, the ALJ correctly found that the Hotel's subsequent unilateral implementation of its access proposal was unlawful. Like in *Grinnell Fire Protection Systems*, the Hotel declared that it had reached its final position before ultimately asserting that the parties were at impasse. And like in that case, the Union offered substantial concessions and declared its intention to be flexible in its positions in future negotiations. In that case, the Board found no good faith impasse existed. The ALJ was correct when he reached the same conclusion here.

As noted in the ALJ's decision, despite the Hotel's contention that "the Union would not yield on unconditional cafeteria access," Resp. Brief at 26, "the Union orally offered to provide management with notification and seek permission when its representatives accessed the hotel for purposes other than for meeting employees in the cafeteria." ALJ Decision at 33. It also agreed

> to several concessions, including that representatives would sign in and out when they arrived at the hotel; they would not silence the cafeteria in order to make announcements or otherwise unnecessarily interfere with the ability of employees to socialize or enjoy their time in the cafeteria; and they would to take airborne or other samples, enter the mechanical rooms, hold events with the

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

> media or elected officials inside the hotel, hold rallies or demonstrations inside the hotel, or place Union surveys or flyers under guestroom doors, without first coordinating such activities with management.

Id. The ALJ found, then, that though the Hotel felt "the Union did not go far enough because it did not completely relinquish access to the employee cafeteria," the Union had made substantial changes in its position and moved the parties closer to an agreement. *Id.* The Hotel having lost patience with the Union's concessions did not, however, create a valid impasse, "nor did it mean that a negotiated agreement was out of reach." *Id.*

Likewise, the circumstances and conditions at play in the parties' 2017 bargaining are also dramatically different from those when the parties initially declared impasse in 2014. Like in *Airflow Research*, the Union's post-impasse proposals demonstrated willingness to significantly reduce some of its demands to the point that they ultimately accepted the Hotel's proposed housekeeping room quotas. Further, the Hotel's post-impasse access proposal and the Union's corresponding offer of further concessions in its December 2017 proposals both weigh in favor of finding that the parties have not yet exhausted the possibility of agreement. Accordingly, no good-faith impasse exists and the Hotel's unilateral implementation of that access proposal was unlawful.

2. *The ALJ correctly found that impasse could not exist when the Hotel had failed to respond to the Union's information request.*

The Hotel also takes issue with the ALJ's finding that a valid impasse cannot be reached when the employer has failed to supply the union with requested information relevant to the core issues separating the parties. *See* ALJ Decision at 34; Resp. Brief at 27.

Specifically, the Hotel asserts that the ALJ "misapplied the law . . . by failing to recognize that Respondent's conduct away from the table was not shown to have been aimed at preventing a contract." *Id.* But that assertion itself misapplies the law. The Hotel mistakes the

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

ALJ's application of Board law holding failure to comply with an information request precluded an impasse finding for a finding that failure to comply with an information request *per se* leads to a finding of bad faith bargaining. *See id.* ("A finding that a bargaining party engaged in a collateral unfair labor practice does not automatically require a finding that the bargaining was conducted in bad faith. The Board has 'been reluctant to find bad-faith bargaining exclusively on the basis of a party's misconduct away from the bargaining table.")

The ALJ made no finding that the Hotel's failure to comply with the Union's information request regarding voice recordings led to a per se finding of bad-faith bargaining. Rather, he simply applied well-established Board law holding that a valid impasse cannot be reached when an employer fails to supply the Union with requested information relevant to the core issues separating the parties, ALJ Decision at 34; *see also Caldwell Mfg. Co.*, 346 NLRB 1159, 1159-1160 (2006); *Colorado Symphony Association*, 366 NLRB No. 122, slip op. at 34 (2018); *Centinela Hospital Medical Center,* 363 NLRB No. 44, slip op. at 2-3; *E.I. Du Pont Co.*, 346 NLRB 553, 558 (2006); *Titan Tire Corp.*, 333 NLRB 1156, 1159 (2001). Here, the Union had requested employee complaints about voice recordings, which it had listed as one of the reasons it wanted to restrict employer access to the cafeteria. *Id.* The ALJ did not find that the Hotel's failure to comply led to a *per se* finding of bad faith bargaining; he found that impasse over that issue could not be valid when the information request remained outstanding. *Id.* As such, the Hotel takes exception to a decision the ALJ did not actually make.

B. The ALJ correctly found that the Hotel violated the Act by contacting Anchorage Police to enforce the unlawful implementation of its access proposal.

The Hotel's exceptions largely cascade from that impasse decision, leading to an objection that the ALJ incorrectly found the Hotel's use of the Anchorage police to enforce the unlawful unilateral implementation of its access proposal was itself a violation of the Act. Resp.

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

Brief at 38. But that exception relies on a premise with no base in either record evidence or Board precedent: that impasse existed such that a unilateral implementation was lawful in the first place. The ALJ correctly found it did not, and the Board should sustain that finding.

The Hotel mistakenly relies on the assertion that the Union's charges do not contain "any allegation or evidence that Respondent's employees were aware of the implementation effort at the time and especially that Respondent had conferred with the police department." *Id.*at 39. Neither point is relevant, nor are they accurate. Whether employees *knew* the Hotel was contacting the police or not is irrelevant to the ALJ's finding that, because no impasse existed, enforcement of the Hotel's unlawfully implemented access policy was unlawful. ALJ Decision at 35.The ALJ did not have to consider, therefore, whether employees knew the Hotel was unilaterally implementing its proposal or contacting the police to enforce it. Likewise, Respondent did not just confer with the police – it contacted them to report a trespass by the Union and asked them to remove Union representatives from the property. J. Ex. 54; GC Ex. 7; GC Ex. 8.

The ALJ was correct, then, in finding that the Hotel violated the Act "by contacting the Anchorage Police Department to assist in enforcing the revised access policy to bar Union representatives from exercising their contractual right." ALJ Decision at 35. Accordingly, the Board should sustain the ALJ's decision regarding that issue.

III. Conclusion

For the foregoing reasons, the Union respectfully requests that the Board deny Respondent's exceptions and sustain all portions of the ALJ's Decision challenged by Respondent.

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

Respectfully submitted this 15th day of April, 2020.

Dmitri Iglitzin, WSBA No. 17673
Kelly Ann Skahan, WSBA No. 54210
BARNARD IGLITZIN & LAVITT LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119
Tel: 206.257.6003
iglitzin@workerlaw.com
skahan@workerlaw.com

DECLARATION OF SERVICE

I, Jennifer Woodward, declare under penalty of perjury under the laws of the state of Washington that on this 15th day of April, 2020, I caused the foregoing to be sent via email to:

Douglas S. Parker
dparker@littler.com

Renea I. Saade
rsaade@littler.com

William J. Evans
evans@alaskalaw.pro

Helena Fiorianti
Helen.fiorianti@nlrb.gov

Signed in Shoreline, Washington, this 15th day of April, 2020.

Jennifer Woodward, Paralegal

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP